



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**Buy America Waiver Notification**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice.

**SUMMARY:** This notice provides information regarding the FHWA's finding that a partial Buy America waiver is appropriate for the obligation of Federal-aid Congestion Mitigation and Air Quality (CMAQ) improvement program funds for the purchase of eight 2012 Ford Escape hybrid four-wheel drive vehicles by Merced County, CA.

**DATES:** The effective date of the waiver is [insert date one day after publication in Federal Register].

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366-1562, or via e-mail at [gerald.yakowenko@dot.gov](mailto:gerald.yakowenko@dot.gov). For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366-4928, or via e-mail at [michael.harkins@dot.gov](mailto:michael.harkins@dot.gov). Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

An electronic copy of this document may be downloaded from the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's database at: <http://www.gpo.gov>.

**Background**

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a partial Buy America waiver is appropriate for the obligation of Federal-aid CMAQ program funds for the purchase of eight 2012 Ford Escape hybrid four-wheel drive vehicles by Merced County, CA.

In accordance with Division A, section 123 of the "Consolidated Appropriations Act, 2010" (Pub. L. 111-117), the FHWA published a notice of intent to issue a waiver on its Web site for the eight 2012 Ford Escape hybrid vehicles.

(<http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=65>) on January 11th. The FHWA received eight comments in response to the publication. Two commenters objected to the proposed waiver but did not provide evidence of a domestic source that meets the appropriate requirements. One commenter questioned whether the Federal Acquisition Regulations (FAR) used by other Federal agencies for direct Federal procurement would allow for a waiver. In response to this commenter, it is noted that the FAR is not applicable to authorizations under the Federal-aid highway program and FHWA must comply with the applicable Buy America provisions in 23 U.S.C. 313 and FHWA's implementing regulations in 23 CFR 635.410. Five of the commenters expressed partial or full support for the proposed waiver based on the belief that there are no domestic manufacturers that are able to provide a vehicle with 100 percent domestic steel and iron

content. Several commenters questioned the need for this specific type of vehicle; however, Merced County's representative explained that this vehicle is necessary to meet their needs in accessing road and bridge construction sites during inclement weather while meeting the vehicle emission requirements of the CMAQ program.

During the 15-day comment period, the FHWA conducted additional review but was unable to locate a domestic manufacturer that could meet a 100 percent domestic steel and iron content requirement. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers that could meet a 100 percent domestic steel and iron content for the 2012 Ford Escape hybrid four-wheel drive vehicle.

The FHWA has considered Merced County's assertion that its needs for this project require a hybrid four-wheel drive vehicle and that no vehicle on the market currently satisfies a 100 percent domestic iron and steel content requirement. The FHWA has also considered the comments stating that Federal funds should be used to purchase a vehicle that is made in the United States. In considering these comments, the FHWA has reevaluated the applicability of the Buy America requirement as it may apply to the purchase of the vehicles. The FHWA's Buy America requirement was initially established in 1983 when the acquisition of vehicles was not eligible for assistance under the Federal-aid Highway Program. As such, the FHWA's Buy America requirements were tailored to the types of products that are typically used in highway construction, which generally meet a 100 percent domestic steel and iron content requirement.

Vehicles, however, are not the types of products that were initially envisioned as being purchased with Federal-aid highway funds when Buy America was first enacted.

In today's global industry, vehicles are assembled with components that are made all over the world. The FHWA is not aware of any vehicle on the market that can claim to incorporate 100 percent domestic steel and iron content. For instance, the Chevy Volt, which was identified by many commenters in a November 21, 2011, Federal Register Notice as being a car that is made in the United States, comprises only 40 percent United States and Canada content according to the window sticker

[http://www.cheersandgears.com/uploads/1298005091/med\\_gallery\\_51\\_113\\_449569.png](http://www.cheersandgears.com/uploads/1298005091/med_gallery_51_113_449569.png).

There is no indication of how much of this 40 percent United States/Canadian content is United States-made content. Thus, the FHWA does not believe that application of a domestic content standard should be applied to the purchase of vehicles. However, the FHWA believes that the vehicles should be assembled in the United States. Whenever a person discusses the manufacture of vehicles, the discussion typically refers to where the final assembly takes place. For instance, under a previous proposed waiver notification and comment process, several commenters urged that the waiver be denied because the Chevy Volt is made in the United States. The FHWA interprets these comments as referring to the assembly of the vehicle in Detroit since the Volt window sticker says that the United States/Canada parts content of the vehicle is only 40 percent. While the manufacture of steel and iron products that are typically used in highway construction (such as pipe, rebar, struts, and beams) generally refers to the various processes that go into actually making the entire product, the manufacture of vehicles typically refers to where the vehicle is assembled. Thus, given the inherent differences in the type of products that are typically used in highway construction and vehicles, we feel that simply waiving the Buy America requirement, which is based on the domestic content of the

product, without any regard to where the vehicle is assembled would diminish the purpose of the Buy America requirement. Moreover, in today's economic environment with the National unemployment rate over 8 percent, the Buy America requirement is especially significant in that it will ensure that Federal Highway Trust Fund (HTF) dollars are used to support and create jobs in the United States.

Therefore, while the FHWA has not located a vehicle that meets a 100 percent domestic iron and steel content requirement, the FHWA does not find that a complete waiver based on non-availability pursuant to 23 U.S.C. 313(b)(2) is appropriate. However, the FHWA also recognizes that at least a partial waiver is necessary in order to permit Merced County to proceed with its project. The FHWA believes that a partial waiver that allows the County to purchase vehicles so long as the final assembly of the vehicle as the end product occurs in the United States is appropriate. This approach is similar to the partial waiver given to Alameda County, CA, for the purchase of 79 electric sedans and electric vans in the November 21, 2011, Federal Register.

In conclusion, and in light of the above, pursuant to 23 U.S.C. 313(b)(1), the FHWA finds that it is in the public interest to grant a partial waiver from the general 100 percent domestic content requirement that applies to Federal-aid highway projects under Buy America. Under this partial waiver, however, the final assembly of any vehicles purchased with HTF funds must occur in the United States. Thus, so long as the final assembly of the 2012 Ford Escape hybrid four-wheel drive vehicles occurs in the United States, Merced County may proceed to purchase these vehicles consistent with the Buy America requirement.

In accordance with the provisions of section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the Merced County waiver page noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110-161, 23 CFR 635.410)

Issued on: March 21, 2012

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Victor M. Mendez  
Federal Highway Administrator

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